Chapman Law Review

Volume 12 | Issue 3 Article 3

2009

International Law and Domestic Legitimacy: Remarks prepared for Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?

Scott Hafetz

International Law and Domestic Legitimacy: Remarks prepared for *Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?*

Scott Sullivan[*]

INTRODUCTION

It is serendipitous that the bicentennial of Abraham Lincoln's birth coincides with the seating of a new American president facing tremendous economic and national security difficulties. The success of the Lincoln Presidency in concluding and assuring the survival of the United States from the divisions of the Civil War reminds us of the enormous hardships the American people can bear and the power of a perseverant president.

The focus of this symposium on Lincoln's Constitutionalism in a Time of War and this particular panel of discussants on Suspending Rights to Sustain Public Safety is apt. Lincoln's policies during the Civil War are perhaps most noteworthy for their elevation of necessity over formalism. His political pragmatism asserted that no President can allow the foundation of the nation to crumble due to reflexive pursuit of rigid formalism.[1] In other words, the President's responsibility to faithfully execute the laws of the nation could not countenance a world in which, when referencing habeas corpus protections, "all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated."[2] Under Lincoln's doctrine, no law would morally be held as preeminent when the fabric of the nation is at risk of being pulled asunder. In comparison to many of the rather drastic measures taken during the Civil War, the policies of the Bush Administration appear tame and unobjectionable. I presume that Professors John Yoo and

[*] Assistant Professor of Law, Paul M. Herbert Law Center, Louisiana State University. This essay reflects remarks made at the 2009 Chapman Law Review Symposium: *Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?*

1 *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1981), *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430–31 (Roy P. Basler ed., 1953).

2 *Id.* at 430.

Kyndra Rotunda will assert arguments that, in comparison to the measures of President Lincoln, the comparatively subdued nature of Bush Administration policies should be left unmolested by the courts and accepted by the populace as similarly necessary measures justified by a terrorist threat that killed over 3,000 people on September 11 and continues to hang over our shores.

I am sympathetic to these assertions. Many of the substantive elements of the Bush Administration's response to September 11 were not, in and of themselves, objectionable. The reality, however, is that despite the nature and magnitude of the threat of terrorism, the policies that have come to represent the cornerstones of President Bush's execution of the war on terror have been repudiated—not only by the courts—but they have been repudiated by our allies abroad and our population at home.

I intend to use my contribution to this symposium to reflect on the interplay between domestic policies in armed conflict and the international legal regulations promulgated under international law relative to the ability of the state to have its policies viewed as "legitimate" by its population and international allies.

I. THE POWER AND PROCESS OF LEGITIMATION

Lincoln's execution of the Civil War demonstrated little patience with legal niceties that could potentially impede his prosecution of the war effort.[3] Some of Lincoln's most controversial acts include unilaterally suspending habeas corpus rights in parts of the Confederacy,[4] engaging in military action that was unsanctioned by Congress,[5] embracing the concept of total war that led to the burning of Atlanta by General Sherman's troops,[6] and ordering a military blockade in the absence of congressional authorization.[7]

Critics argued that each of these acts violated the laws of the United States and core principles of separation of powers that vested particular foreign affairs powers, such as the power to declare war, and, more implicitly, the judgment to suspend

3 *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 11–12 (2001).

4 Curt Bentley, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution*, 2007 BYU L. REV. 1721, 1745 n.120 (2007) ("For example, Abraham Lincoln unilaterally suspended the Writ of Habeas Corpus, ignoring Justice Taney's decision in *Ex parte* Merryman, 17 F. Cas. 144 (1861), during the Civil War.").

5 LOUIS FISHER, PRESIDENTIAL WAR POWER 38 (1995).

6 Major Jeffrey F. Addicott, *Operation Desert Storm: R. E. Lee or W. T. Sherman?*, 136 MIL. L. REV. 115, 122–23, 128–29 (1992).

7 FISHER, *supra* note 5, at 38.

habeas corpus during certain emergencies.[8] Despite these critiques his presidency progressed with the unmistakable air that despite legal uncertainty, or even Constitutional violation, the preservation of the Union was a goal of sufficient importance to override any particular provision of law.[9] This doctrine was justified by the administration as one of "necessity" that if not authorizing power to the President beyond the scope of the Constitution, at least provided substantial bend to Constitutional prerogatives in times of national emergency.[10]

The rights-restricting actions imposed during the ongoing war on terror have been much more restrained than that of the Civil War. Unlike Lincoln's broad grants of power to military commanders to suspend habeas corpus as they saw fit, there has been no suspension of the right of habeas corpus.[11] The detention facilities at the U.S. Naval Station at Guantanamo Bay compare quite favorably to the harsh treatment and occasional summary execution suffered during the Civil War. Similarly, President Bush has received Congressional authorization for each major military operation in which his administration engaged, despite his clear belief that such assent is Constitutionally unnecessary.[12]

In such light, it is curious that Benjamin Wittes represented mainstream sentiment, both domestically and abroad, when he stated before the Senate Judiciary Committee that, "[a] few years ago in the winter of 2002, almost nobody doubted . . . that the United States is entitled to detain enemy forces in the war on terrorism. Today, doubt concerning the legitimacy of war on terrorism detentions is more the norm than the exception."[13]

---

8 *See* Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1358–60 (1993) (reviewing MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991)).

9 *See* NEELY, *supra* note 3, at 235.

10 *See* Neely, *supra* note 3, at 12–13; Paul Finkelman, *Limiting Rights in Times of Crises: Our Civil War Experience—A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L., POL'Y & ETHICS J. 25, 39–41 (2003).

11 The Honorable Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 740 (2007) ("The United States Constitution explicitly allows for the complete suspension of habeas corpus rights during wartime, but the current administration recognized that the more judicious approach would be to delay, not eliminate the right of Article III court review.").

12 Memorandum Opinion For the Deputy Counsel to The President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm (noting that the President has broad constitutional power to take military action in response to the Terrorist Attacks on the United States on September 11, 2001).

13 *Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System: Hearing Before the Committee on the Judiciary United States Senate*,

A. The Underpinnings of Legitimate State Action and Failings in the War on Terror

The conventional wisdom that President Lincoln's draconian restrictions on civil rights and infringements on Constitutional culture were legitimate while President Bush's were not begs the question of what "legitimacy" is composed of and how it is derived. Clearly, this question is enormous in its breadth and cannot be adequately examined in the time and space limitations here. This conventional wisdom, however, is consistent with much of what we understand of how state actions and institutions gain legitimacy through collective acceptance, even when those actions are also considered normatively suspect.

1. Building Legitimacy in State Action

In a 2005 article in the Harvard Law Review, Richard Fallon noted that legitimacy has three dimensions—legal, sociological, and moral.[14] Legal legitimacy derives from decisions and state actions that the public views as comporting with existing law.[15] Sociological legitimacy accrues when the public views an institution or position of the state as "approximately or on the average oriented to certain determinate 'maxims' or rules" that the society acknowledges as culturally defining.[16] Moral legitimacy differentiates itself from the others by emphasizing the degree to which the action of the state is intuitively justifiable under prevailing moral standards and is thus a respectable use of power.[17] Despite the reliance of each dimension on different, although somewhat overlapping justification, each of these types of legitimacy share the characteristic that they represent a collective process of determination and conclusion based on the extrapolation of cultural norms relative to relevant social goals being pursued.

It is important to note that the threshold a policy or institution must reach in terms of its legal, sociological or moral legitimacy is not fixed.[18] Similarly, the strands of legitimacy are

110th Cong. 13 (2008) [hereinafter *Improving Detainee Policy*] (statement of Benjamin Wittes), *available at* http://www.fas.org/irp/congress/2008_hr/detainee.pdf.

14 Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005).

15 *Id.* at 1794–95.

16 MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 124 (Talcott Parsons, ed., A.M. Henderson & Talcott Parsons trans., 1957); Fallon, *supra* note 14, at 1795–96.

17 Fallon, *supra* note 14, at 1796–1801 (describing moral legitimacy).

18 *See generally id.* at 1796–99 (discussing moral legitimacy and ideal and minimal theories as thresholds for such).

intertwined.[19] Because legitimation is a collective process, state actions are judged relative to the collective's baseline understanding of whether the policy goal and policy actor are worthy of societal trust in producing normatively good results consistent with cultural values.[20] In the context of armed conflict and national security, this background understanding adjusts to society's perception of the urgency of governmental action and whether the institution executing state action is acting sincerely in response to the public interest rather than engaging in self-dealing.

2. Legitimation Failings in the War on Terror

The dissipation of the legitimacy of the war on terror policy Wittes cites from 2002 to the present is unquestionably due to a variety of missteps relating to the substantive provisions of U.S. policy.[21] In this vein, he argues that the Bush Administration "obtusely refused to tailor the detention system contemplated by the laws of war to the very unusual features of the current conflict."[22]

There is no doubt that the public's view of a policy as being normatively "correct" in substance plays a great role in ascertaining the legitimacy Fallon describes.[23] Because the trustworthiness of the actor (the President) is instrumental in society's acceptance of state action, disclosure, debate and the aura of the incorporation or airing of dissenting views heightens the acceptability of acts otherwise contrary to other collective values. Similarly, tailoring substantive policy as closely as possible to existing law demonstrates (real or imagined) adherence to previously made policy judgments that retain value to society.

President Lincoln often implicitly recognized these limitations through his speeches and actions during the Civil War. He justified deviations from existing norms by invoking a "necessity" defense that was underscored by the pervasive effects of the war on nearly every American and the procedural difficulties of Congressional action inherent to the time.[24] Instead of simply asserting plenary executive power over the use of force and the suspension of individual rights, he conceded that

19 *See generally id.* at 1789–94.

20 *See generally id.* at 1811, 1818, 1848–51.

21 *Improving Detainee Policy*, *supra* note 13, at 13.

22 *Id.*

23 Fallon, *supra* note 14, at 1795.

24 JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 191–92 (2007).

his actions required Congressional ratification.[25] These acts of ratification provided external validation which made societal acceptance more palatable.[26] In contrast, Congressional validation of war on terror policies was seen as an unacceptable divestiture of the Administration's theory of executive power and, as such, a last resort only to be taken following repudiation by the judicial branch.[27]

B. International Affairs, International Law, and the Effect on Legitimacy

The legitimating value Lincoln gained through Congressional ratification may ultimately tell a lesson that is more about the value of external validation than domestic checks and balances. For Lincoln, congressional ratification of imposing a military blockade and suspending habeas corpus was essential because the Constitutional text clearly invoked Congressional powers in those actions, even if such powers were not explicitly granted to the legislature.[28]

In the war on terror, international law, and especially international humanitarian law, has played a crucial role in providing the previously established standards in the most fevered debates over detention policy and accepted means of interrogation.[29] The primacy of international law in these realms is somewhat surprising given the American predisposition to dismiss the importance of international law generally. In spite of this general attitude to such law, I believe that international law has acted as a cornerstone here in gauging the legitimacy of state action as a general matter. This is due to the greater incorporation into a rights-oriented regime affecting traditionally domestic concerns combined with (1) its place as an external benchmark of executive action; and (2) the absence of domestically embedded rules and standards acting contrary to the thrust of international law.

1. The Transformation of International Law

Notions of appropriate presidential fashion are not the only things to have changed since Lincoln's tenure. The substantive scope and nature of international law has changed dramatically

25 NEELY, *supra* note 3, at 8.

26 *Id.* at 29–30.

27 *See generally* GOLDSMITH, *supra* note 24, at 205–13.

28 Of course, the predominant view of the time was that the suspension of habeas corpus was exclusively granted to Congress as discussed in *Ex parte* Merryman, 17 F.Cas. 144, 148–52 (C.C.Md. 1861) (No. 9,487).

29 *See* GOLDSMITH, *supra* note 24, at 39–42, 60–64, 113–14.

since Lincoln's management of the Civil War. While notions of the customs and practices of war figured prominently (albeit often pejoratively) in the Lincoln White House, these notions were locked in great ambiguity and considered the vestiges of non-analogous imports of international European conflicts of relatively recent vintage.[30]

Debates continue to roil among academics and policy-makers over the proper Constitutional station of treaty and customary international law and the forces of compliance international law exerts over state action.[31] Those very worthy debates are beyond the scope of this Essay. However those debates might be resolved, the materially different perception of the legitimacy of the war-oriented actions of Presidents Bush and Lincoln, in part, seems to reflect the power of international law framework to organize and set the terms of the debate prior to the initiation of armed conflict—a framework that sets the tone by which legitimacy can be ascertained or denied.

This economic integration has caused greater political integration that in turn has spurred greater legal integration in international law.[32] Simultaneously, the substantive scope of international law has dramatically expanded to one emphasizing individual rights and away from traditional conceptions of sovereignty.[33] This movement has sparked a proliferation of international legal restrictions that emanate from outside the federal government generally, and outside the Executive Branch, specifically.[34]

The legal landscape of extra-executive forces regulating executive action has changed dramatically since Lincoln's presidency.[35] Following World War II, the United States faced growing mistrust of government power in the wake of Vietnam and Watergate.[36] These led to a number of congressional actions more strictly regulating executive action in armed conflict and foreign affairs, including more stringent regulation of intelligence

30 *See* NEELY, *supra* note 3, at 139–44, 150, 234–35.

31 Christopher Linde, *The U.S. Constitution and International Law: Finding the Balance*, 15 J. TRANSNAT'L L. & POL'Y 305, 307 (2006).

32 Jay Lawrence Westbrook, *Legal Integration of NAFTA Through Supranational Adjudication*, 43 TEX. INT'L L.J. 349 (2008).

33 *Id*. at 351–52.

34 *Id*. at 357.

35 Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 873–76 (2007).

36 Richard Morin & Dan Balz, *Americans Losing Trust in Each Other and Institutions*, WASH. POST, Jan. 28, 1996, at A1.

gathering,[37] the President's use of force,[38] federal criminal liability for actions of soldiers in the field,[39] as well as more generous rules on access to federal courts under habeas corpus and civil suit actions.[40] These restrictions were heightened by the proliferating growth in international law in regulating state behavior through the exercise of universal jurisdiction and international criminal prosecutions,[41] which left American officials exposed to ambiguous legal norms and systems of criminal justice "not beholden to any government and a prosecutorial system without real political checks and balances."[42] As a matter of domestic law, "lawfare" was made more tangible by congressional actions restricting the President's power over military affairs, increasing access to federal courts under habeas corpus and civil suit actions, and the expanding scope of international law regulating behavior on the battlefield.[43]

The enforcement of the law of war during Lincoln's presidency was based on reciprocity.[44] As such, the nature of one state's obligation under the law could expand or contract based on the degree of compliance honored by its enemy.[45] Moreover, the substantive limitations imposed on a state by the customary international law of the time were abstract in substance, quintessentially international in nature, and infrequently enforced by penalty.[46] Perhaps most importantly, the law of war, reflecting international law of the time more generally, unquestionably emphasized state restraint rather than individual right.

---

37 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1863 (2006)).

38 War Powers Act of 1973, 50 U.S.C. § 1541 (2006).

39 War Crimes Act of 1996, 18 U.S.C. § 2441 (2000); *see also* GOLDSMITH, *supra* note 24, at 64 (discussing OLC memoranda assessing the reach of Miranda rule applicability in Afghanistan).

40 *Compare* Johnson v. Eisentrager, 339 U.S. 763 (1950); Rasul v. Bush, 542 U.S. 466, 484 (2004); and actions under the Bivens doctrine, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1972).

41 Milena Sterio, *The Evolution of International Law*, 31 B. C. INT'L & COMP. L. REV. 213, 213–14 (2008).

42 GOLDSMITH, *supra* note 24, at 62.

43 *See* William G. Hyland Jr., *Law v. National Security: When Lawyers Make Terrorism Policy*, 7 RICH. J. GLOBAL L. & BUS., 247, 249–50 (2008).

44 Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873, 878–79 (2007).

45 *See* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 368–71 (2009) (for a discussion of the general principles of reciprocity).

46 *See generally* Robert Fabrikant, *Lincoln, Emancipation, and "Military Necessity": Review of Burrus M. Carnahan's Act of Justice, Lincoln's Emancipation Proclamation and the Law of War*, 52 HOW. L.J. 375, 388–90 (2009) (for a discussion of the international law of war at the start of the Civil War) (book review).

Contemporary international law triumphs rights over encouraging restraint.[47] While customary international humanitarian law in Lincoln's era provided protection to noncombatants such as women,[48] children[49] and the elderly,[50] these protections were not intrinsic to the person, but reflective of institutional values of the aristocracy and organized religions of the day.[51] International humanitarian law of the time was also considered irrelevant in matters considered domestic in nature and thus subject to the internal sovereign order of the state.[52] This externally oriented view of international law norms has likewise given way to an atmosphere in international law that all that is domestic is also international.[53] A shift toward regulating internal as well as international activity has permeated the regulation of international humanitarian law as well.[54]

The development of a rights-oriented focus of international humanitarian law is due, in large part, to the continuing proliferation of rights-based treaties and doctrines including the International Covenant on Civil and Political Rights (ICCPR) as well as the Universal Declaration of Human Rights.[55] The drafting, interpretation and scholarship that have surrounded the growing structure of human rights law has encouraged a growing "parallelism between norms, and a growing measure of convergence in their personal and territorial applicability."[56] Common Article 3 of the Conventions affords rights to individuals in non-international armed conflict.[57] Similarly, Article 2(7) of the U.N. Charter acts to ensure that matters within states' domestic jurisdiction shall not prejudice the application of enforcement measures within the U.N. structure.[58]

47 Phil C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 CHINESE L.J. 455, 488 (2009) (noting that "the protection of human rights is a chief imperative of contemporary international law").

48 Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 242 (2000).

49 *Id.*

50 *Id.*

51 *See generally* Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269 (1997) (for a discussion of humanitarian law during the Civil War).

52 Meron, *supra* note 48, at 247.

53 *Id.*

54 *Id.* at 247–48.

55 Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum For Potential Victims*, 20 INT'L J. REFUGEE L. 533, 537 (2008).

56 Meron, *supra* note 48, at 245.

57 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

58 Meron, *supra* note 48, at 247; U.N. Charter art. 2, para. 4.

The expanding scope and transformation of the underlying premise of international law from organizing state action to protecting human rights has altered the way in which states react to international law as a guidepost in determining state policy and behavior.[59] As related to the war on terror, the Geneva Conventions have taken center stage in the tension between international law and U.S. policy.[60]

2. Geneva as a Touchstone

It is a paradox in many ways that President Lincoln is considered a crucial figure in the structural development and substantive content of the contemporary law of international armed conflict. The Leiber Code, promulgated by Lincoln in 1863, provided both one of the earliest governmental codifications delineating acceptable and unacceptable behavior and tactics by government troops, and also endorsed the broad-based suffering of civilian populations as a byproduct of a total war doctrine justified under military necessity.[61]

It has become a fundamental rallying cry by opponents to U.S. policy in the domestic and international political arenas that the U.S. must "follow the Geneva Conventions."[62] The belief that the Bush Administration has sought to circumvent the Conventions has led to a pervasive conclusion that the United States' "take on the Geneva Conventions destroys America's international reputation for the rule of law."[63]

The substantive significance of Geneva compliance is largely lost on the vast majority of non-academic commentators making this plea. The reality is that the general population, understandably, does not know what the Conventions require in any detail. Nor does it seem likely to me that a comprehensive understanding of each of the Conventions, their applicability, and the rights afforded to various classes of detainees would matter to the underlying debate. A comprehensive understanding of the substantive provisions of the Conventions ultimately does not matter. I suspect the cry for Geneva Conventions compliance represents two broader understandings that are viewed as crucial to the American public: (1) the

59 *See generally* Chan, *supra* note 47, at 488.

60 Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1076–77, 1093–99.

61 Charles A. Flint, *Challenging the Legality of Section 106 of the USA PATRIOT Act*, 67 ALB. L. REV. 1183, 1190 (2004).

62 Faiz Shakir, *Fox Guest: We Should Ignore McCain Since He 'Was So Traumatized' By P.O.W. Experience*, THINK PROGRESS, Sept. 19, 2006, http://thinkprogress.org/2006/09/19.damato/.

63 Thomas P.M. Barnett, *The State of the World*, ESQUIRE, May 1, 2007, at 108.

Conventions represent the presence of defined extra-executive checks on executive action; and (2) failing to comply with the Conventions is viewed as the repudiation of a previously made commitment to other nations.

Beyond the domestic base, however, is the fact that much of the domestic legal debate has unfolded within the framework of international law, that U.S. policies at home and abroad violated such law, and that U.S. population and the international population found such violations as highly objectionable.

The belief that the U.S. was acting in violation of international law not only affected the perception of U.S. policy, but also materially affected the ability of the nation to sew together a sturdy and cohesive web of allies who could be relied upon to provide assistance in a variety of different ways.

The influence of international law as a legitimating device (or, in this case a de-legitimating device) is evident through President Bush's handling of the question of the applicability of Geneva Convention protections for individuals detained pursuant to the war on terror.[64] Likely more than any other single body of law, the Bush Administration's decision to forego adherence to the Geneva Conventions in favor of a more generalized promise to respect the "spirit" of Geneva law has drawn criticism by both the American and global population.

The decision to forego a structural commitment to the Conventions in favor of a spiritual one implied that the details of the protections encompassed therein were not only unimportant, but also needed to be discarded in order to pursue the effective prosecution of the war on terror.

II. SOME POSSIBLE LESSONS ON A ROLE FOR INTERNATIONAL LAW

During the Civil War, President Lincoln's policies were patently clothed in the threat of the dissolution of the nation.[65] The Constitutional doctrine that flowed from this obvious threat was based, and accepted, on a premise of necessity that was understood by the populace, even when the resulting policies were unpopular.[66] The war on terror does not share these characteristics. The threat to America is not only foreign to our

64 *See* Sharon Kehnemui Liss, *Bush:Gitmo Prisoners Protected by Geneva Conventions*, FOX NEWS, Jun. 9, 2005, http://www.foxnews.com/story/0,2933,44169,00.html.

65 Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 169 (1993).

66 Williams, *supra* note 11, at 681.

common understandings but is also less intense in its severity. The latency of the threat is further complicated by the fact that the policies that have been created to address the terrorist threat are unfolding in a political culture that remains scarred by the increasingly routine nature of government abuses of power and position that have come to light over the past fifty years, not only as a general matter, but within the realm of national security concerns in particular. These realities have placed a premium on building consensus, both internationally and domestically, and forcing the political investment of as many institutions and groups as possible.

The contemporary framework of international law and international organizations has served as an obstacle to the legitimation of current U.S. policy, but also created an unmatched structural opportunity for President Obama to incorporate U.S. policy preferences into the goals, operations, and structures of the international system. This can perhaps best be done by incorporating structural restraints on the exercise of U.S. power as the general rule while simultaneously opening the debate over the normative desirability of provisions of international law that he perceives as obstructing U.S. goals.

Similarly, purveyors of international law are best served not by reflexive service to provisions of existing law, but through the advocacy of the type of structural limitations that international law has proven most effective—procedural safeguards and overarching principles of action.

The process of public debate in the United States encourages an airing of policy choices that may tweak the executive's proposed policy or encourage more fundamental restructuring of policy frameworks. As an international matter, the incorporation of allies, enemies and NGOs forces recognition of an underlying value to a controversial policy in an attempt to stake out substantive grounds for the purpose of compromise.[67] In both circumstances, the policy of the President no longer emanates from the executive branch alone, but creates investment among a group of actors that, as a consequence of that investment, creates legitimacy.

67 This policy movement among allies and NGOs is evident in recent discussions as to the approach of the Obama Administration's approach to future of the detainees at Guantanamo Bay. *See* Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16.

A. Consensus Building and International Dialogue

The conflict between exercising unilateral power and engaging in a consultative process is, at heart, playing out the tension between exercising the discretion that attaches to unilateral power against the intrinsic constraints that accompany seeking approval from other parties. In resolving this tension, the executive branch sacrifices discretion to some degree each time it pursues external approval. Similarly, presidential policies are vulnerable to the external challenge of illegitimacy when the foundation of those policies is exclusively the unilateral power of the President.[68] This give-and-take represents a core element of many commentators' critiques of the Bush Administration's failure to engage in consultation and consensus building.[69] Instead of integrating legal constraints into a broader framework of war policy, the Administration "chose to push its legal discretion to its limit, and rejected any binding legal constraints."[70]

Working within international law affecting security policy encourages the executive branch to engage in its policy decision-making and execution in as transparent a manner as possible and justifies such actions in public in order to preserve underlying policy goals that might otherwise be compromised.

Moreover, the incorporation of international law does not preclude legislative override where necessary. The last-in-time doctrine enables the political branches to supersede international law through the passage of contradictory federal legislation.[71] The formal incorporation of Congress through such a process fosters public debate both domestically and internationally, and also provides incentive for the legislature to come off the sideline to place preferred policies on solid legal footing. Regardless of its success or failure, the process of forming legislation and engaging in the political machinations that surround prospective legislation encourages a broader public dialogue as well as a focal

68 As a doctrinal matter this concept is a rough corollary of judicial assessment of the constitutional validity of executive action in Youngstown. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (holding a violation of Presidential authority based on an external constitutional challenge).

69 *See*, *e.g.*, *Lawmakers react to Miers' withdrawal*, CNN, Oct. 27, 2005, http://www.cnn.com/2005/POLITICS/10/27/miers.reax/index.html (quoting Senator Charles Schumer from New York suggesting Bush should take his time "carefully with real consultation and real consensus. One of the reasons for this problem–this mistake–is that there was no real consultation.").

70 GOLDSMITH, *supra* note 24, at 119.

71 Justin C. Danilewitz, *The Ties That Bind: U.S. Foreign Policy Commitments and the Constitutionality of Entrenching Executive Agreements*, 14 J. TRANSNAT'L L. & POL'Y 87, 91 (2004).

point for discussion of policy issues upon which debate can unfold. The focal points of such debates tend to revolve around legislation that sparks the greatest public concern and reflects positions centered on popular understanding of the "most important" points surrounding the issue.

Invitation for public debate in the policy-making process enables dissenting views to voice opinions and air grievances. More broadly, incorporating the public into the debate acts as a functional and productive way to curb the vitriol of dissent—which perceives itself as unduly marginalized and unjustly silenced in affecting the actions and direction of government. Public inclusion in the broader policy judgments of war and armed conflict not only enables public opinion an outlet and opportunity for enhanced focus but also encourages public investment in the policy outcome that is ultimately embraced at the conclusion of the process, even if that outcome reflects a decision against the passage of any legislation.

B. Extra-Executive Structural Regulations

International law provides a substantive framework for many of the types of legal difficulties that occur frequently among nations but are typically under-examined in the domestic legal context. In such circumstances, international law can provide the structural design to move the executive toward consensus building through constraints that guard against the intrinsic temptation of the executive branch to maximize its own power at the potential cost of losing its credibility. Where norm vacuums exist in sorting out the law as a domestic matter, international law often provides a basic substantive framework around which more extensive law can be built domestically.

These structural and touchstone characteristics of international law assist the public in assessing, and accepting, final provisions of law carried out in policy. Specifically, incorporating international law in the domestic process (1) promotes international and domestic political dialogue; (2) encourages the executive branch to engage in formal and informal justification of its policies; and (3) incentivizes transparency through public disclosure.

The importance of structural limitations surrounding executive action is demonstrable in the discussion surrounding the treatment of prisoners at Guantanamo Bay. Addressing the issue of the standard of treatment of U.S. detainees, President Bush asserted that the U.S. would treat detainees "humanely

and, to the extent appropriate and consistent with military necessity . . . ."[72] The power of this statement as a force of legitimation, is compromised by the fact that "it was very vague, it was not effectively operationalized into concrete standards of conduct, and it left all of the hard issues about 'humane' and 'appropriate' treatment to the discretion of unknown officials."[73]

Even setting aside the question of ambiguity in determining core terms such as "humane" and "appropriate," the President's statement fails on an even more fundamental level. The failure to effectively operationalize questions of treatment implies that the President's commitment is being less than fully absorbed by lower officials, but the failure reaches beyond that. It is the failure of any extra-executive check on the formulation of the policy, and a total lack of observable way to ensure that the overarching policy statement is being implemented, that dooms the President's assertion to face endless scrutiny and skepticism.

CONCLUSION

My characterization of international law as a device that facilitates sociological legitimacy of policy decisions relative to the war on terror is simply to note that the key position international law compliance has taken in the ongoing debate over national security law issues. American history is rife with examples of the importance of international affairs in major domestic policy determinations. What makes the ongoing war on terror so interesting is the expansive manner in which international law has guided the manner in which these important domestic decisions are discussed, digested, and weighed as a domestic matter—and how that process has transpired with little handwringing over the validity or relevance of international law writ large.

72 George W. Bush, Memorandum on Humane Treatment of Taliban and al Qaeda Detainees, (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf

73 GOLDSMITH, *supra* note 24, at 120.